Supreme Court, U.S.
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No. 03-159

In The
Supreme Court of the United States

SAM B. MCQUEEN,

Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT (formerly known as SOUTH CAROLINA COASTAL COUNCIL),

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the South Carolina Supreme Court properly rejected, in a unanimous decision, a regulatory taking claim based on a state agency's denial of an application to bulkhead and fill an area of tidelands along the South Carolina coast which was created by natural erosion and as a result had become subject to public ownership and the longstanding South Carolina public trust doctrine.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management ("OCRM") respectfully requests that this Court deny the petition for a writ of *certiorari*, filed by Petitioner Sam B. McQueen ("Petitioner") to review the decision of the South Carolina Supreme Court in *McQueen v. South Carolina Coastal Council*, 580 S.E.2d 116 (S.C. 2003).

INTRODUCTION

Petitioner is challenging a unanimous decision of South Carolina's highest court that denied a taking claim based on the state's refusal to allow the filling of an area regularly inundated by the tides. He argues that South Carolina's application of its public trust doctrine – a state common law doctrine that protects certain important public interests in the area below the mean high water mark – somehow runs counter to this Court's case law recognizing that background principles of property and nuisance law can bar a regulatory taking claim. Not only does the South Carolina Supreme Court's decision correctly apply a longstanding common law background principle, it fully comports with this Court's regulatory takings decisions, including *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Moreover, the state court's decision also indicates that, as a result of erosion and the change of position of the shoreline, title to these lands passed to the state entirely.

The South Carolina Supreme Court acted well within the scope of the GVR order this Court issued in *McQueen v. South Carolina Dep't of Health and Envtl. Control*, 533 U.S. 943 (2001), in ruling that Petitioner need not be compensated by the state. Upon remand from this Court, the state court considered *Palazzolo*, applied the rule governing a total regulatory taking set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and concluded that under the circumstances of this case, the public trust doctrine constituted a valid background restriction on Petitioner's use of land that had become inundated by the ocean's tides. In doing so, the court relied in part on a well developed history of the public trust doctrine amply documented in South Carolina's judicial decisions stretching back over one hundred years. The state court's interpretation and application of this common law principle is entirely consistent with this Court's takings precedents, and properly affirms the state's traditional sovereign powers over tidelands within its own borders.

Contrary to Petitioner's claims, *see* Petition for a Writ of Certiorari ("Pet.") at 12, the court's opinion on remand does not conflict with *Lucas* and *Palazzolo*, but faithfully applies these precedents. Nor is there any significant conflict among the lower courts regarding application of the public trust doctrine in takings cases. Just three months ago, this Court denied *certiorari* in a similar case, which raised the issue of whether the state public trust doctrine, properly applied in accordance with state law, can constitute a background principle of state property law barring a regulatory taking claim. *See Esplanade Props., LLC v. City of Seattle,* 307 F.3d 978 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2574 (2003). For several different

reasons, as explained below, a denial of *certiorari* is even more appropriate in this case, and justified by Petitioner's complete failure to present any considerations warranting review under Supreme Court Rule 10.

STATEMENT OF THE CASE

1. In 1961 and 1963, Petitioner purchased two lots, originally created by fill and located on saltwater canals, for $2,500 and $1,700, respectively. R. 209. Unlike his neighbors, Petitioner failed to apply for permits to fill and bulkhead his lots to protect them from erosion. Starting in the 1960's, the lots began to erode and change from dry land into marsh and mudflats, subject to the ebb and flow of the tides. R. 210-13. Petitioner did not apply for any permits to develop the lots until 1991, nearly 30 years later, when the lots had become inundated by the tides. Many of his neighbors, by contrast, had constructed bulkheads and developed their properties before any erosion occurred. R. 211-12.

2. In 1991, Petitioner applied to the United States Army Corps of Engineers ("Army Corps") and the Office of Ocean and Coastal Resource Management ("OCRM") (formerly known as the South Carolina Coastal Council) in the South Carolina Department of Health and Environmental Control for permits to build bulkheads and to fill the tidelands on both lots, in an attempt to backfill those areas that had eroded away. The Army Corps, which customarily informed the OCRM of such applications by issuing a joint notice, mistakenly issued a notice for only one of the lots. R. 155-56. Although the OCRM subsequently issued a permit for the lot, allowing construction of a bulkhead 75

feet from the street, Petitioner wanted a 90-foot setback. He consequently filed an administrative appeal of the permit.

3. Due to the Army Corps' mistake in failing to issue a notice to the OCRM for both lots, Petitioner resubmitted his applications. He sought to place 100 cubic yards and 200 cubic yards of fill in the tidelands area of the two lots, and to construct bulkheads 90 feet and 102 feet from the road, respectively. R. 275, 313. The OCRM denied both applications in 1993 because the filling would destroy certain public interests in the tidelands, especially fisheries. It determined that most of the lots was "critical area or salt water wetlands,"[1] R. 147, which were densely vegetated by plants growing below the mean high-water mark, R. 160. These plants provided food and habitat for fish and shellfish, served as a "natural buffer for high ground," and helped filter sediments and pollutants. R. 161-62.

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[1] In its most recent opinion, the South Carolina Supreme Court left no doubt that Petitioner's lands were and continue to be inundated by tidal flow. As the court noted,

> At the time of the [1994 OCRM] hearing, the majority of both lots had reverted to tidelands or critical area saltwater wetlands. This reversion was caused by 'continuous' erosion, although little change had occurred since the permits were originally sought in 1991. *The 53rd Avenue lot is inundated regularly by tidal flow all the way up to the street.* The 48th Avenue lot has less tidal flow but contains more critical area wetland vegetation. On both lots, only some irregular portions of high ground remain.

580 S.E.2d at 118. (emphasis added).

4. Petitioner appealed the denial of the permits to the Coastal Zone Management Panel, which affirmed the denial. He then sought judicial review of this decision before the South Carolina Circuit Court. A master-in-equity appointed by the court concluded that the permit denials constituted a taking and awarded Petitioner $100,000. R. 11. The South Carolina Court of Appeals affirmed in part and remanded for further consideration of the amount of compensation. *McQueen v. South Carolina Coastal Council*, 496 S.E.2d 643 (S.C. Ct. App. 1998).

5. On appeal, the South Carolina Supreme Court reversed, finding that Petitioner had failed to demonstrate that he had distinct investment-backed expectations of developing the lots, in light of his failure to take action for thirty years while the lots slowly eroded away and became inundated by the tides. *McQueen v. South Carolina Coastal Council*, 530 S.E.2d 628, 634-35 (S.C. 2000). Before the Supreme Court, the OCRM had also argued that background principles of state property law barred Petitioner's claim.

6. Petitioner sought review in this Court, which remanded the case for reconsideration in light of *Palazzolo*. 533 U.S. at 943. On remand, both parties submitted briefs discussing the impact of *Palazzolo* on Petitioner's takings claim. As directed by the South Carolina Supreme Court, the briefs also discussed the relevance of reasonable investment-backed expectations and background principles of law to Petitioner's takings claim. In its new opinion, the South Carolina Supreme Court examined *Palazzolo*, revisited Petitioner's takings claim, concluded

that Petitioner had been denied all economically viable use of the property,[2] but stated that background principles of property law, embodied in the state's public trust doctrine, barred Petitioner from establishing a taking under the circumstances of this case. *McQueen*, 580 S.E.2d at 119-20. In addition to its reliance upon the public trust doctrine, the court also recognized that, in accord with the traditional rule regarding changes in title boundaries and eroding shorelines, this formerly private land had been transferred into public ownership by operation of law. Petitioner seeks review for the second time from this Court.

REASONS FOR DENYING THE WRIT

Petitioner would have this Court believe that it is appropriate to review a unanimous decision, from the highest court in a state, interpreting a matter of state law. Yet, there is nothing about this case that requires review from the Court. Petitioner has failed to demonstrate under Supreme Court Rule 10(b) or (c) that the decision below raises an important federal question that should be settled by this Court. The decision below rests on state principles – the public trust doctrine and a state's presumptive title to tidelands – that do not involve a federal legal issue. Arising from, and based on a unique set of facts, this

[2] Contrary to Petitioner's representation, *see* Pet. at 8, the state repeatedly contested the question of whether the permit denials deprived Petitioner of all economically viable use of the property within the meaning of *Lucas*. *See* April 22, 2002 Brief of Petitioner, pp. 9-14; R. 146-147.

decision will not have national ramifications (contrary to Petitioner's assertion, *see* Pet. at 22), or upset settled expectations under either federal or state law.

The decision also demonstrates that the South Carolina Supreme Court fully complied with this Court's order to consider further its findings in light of *Palazzolo*. On reconsideration, the court properly followed both *Lucas* and *Palazzolo* in finding that the public trust doctrine prevents Petitioner from claiming a taking based on a denial of a permit to fill tidelands that formed over the course of thirty years. The state court's application of the public trust doctrine is consistent with that doctrine's longstanding history in South Carolina and well-established state control over tidelands below the mean high water mark. The state court's discussion of the state's presumptive title to Petitioner's submerged lands is, similarly, a reflection of state common law principles. For these reasons, as set forth in further detail below, this Court should deny the petition for a writ of *certiorari*.

I. THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW AND IS NOT APPROPRIATE FOR REVIEW BY THIS COURT.

At its heart, this case is about a state's authority to apply settled definitions of the nature of property interests in coastal areas under state law. Far from constituting a new and expansive concept that will be used to deny takings claims across the country, *see* Pet. at 14, this case merely affirms certain public interests in submerged lands under the public trust doctrine and the state's presumptive title to submerged coastal lands. As this Court stated

in *Lucas*, 505 U.S. at 1031, the question of whether common law principles preclude a taking claim "is one of state law to be dealt with on remand." The South Carolina Supreme Court has accordingly determined this question by reference to the state's public trust doctrine – a narrow background principle that is geographically confined and within the state's purview to determine – and this Court should have no real interest in the state's resolution of this question under its own laws. *See Joy v. St. Louis*, 201 U.S. 332 (1906) (holding that changing property boundaries are a matter of state law to be determined by state courts); *see also Ward v. Illinois*, 431 U.S. 767, 772-73 (1977) (recognizing the binding nature of a state court's construction of state law).

Petitioner has failed to demonstrate how the decision below implicates a federal constitutional question. Both the scope of the state's public trust doctrine, and the nature of a landowner's underlying property interest for the purpose of a takings analysis (including the application of background principles) are questions of state law. *See Lucas*, 505 U.S. at 1030 (discussing this Court's resort to "existing rules or understandings that stem from an independent source such as state law" in defining property interests); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (noting that the existence of a property interest may be determined by reference to state law principles) (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). This Court has affirmed in numerous cases that the resolution by the highest court in a state of a matter of state law is not appropriate for federal review. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 & fn. 9 (1981) (refusing to overturn the construction of Louisiana law by the highest court of that state); *Hicks on*

Behalf of Feiock v. Feiock, 485 U.S. 624, 629-30 (1988) (declining to review a state court's conclusions of state law). Petitioner's attempts to wring a federal constitutional question out of the state's application of its property laws, *see* Pet. at 20-22, do not render this decision appropriate for review by this Court. There is nothing about the South Carolina Supreme Court's application of the state's own public trust doctrine to justify review by this Court.

Not only does the South Carolina Supreme Court's decision rest on a settled interpretation of state law, it also extends beyond the application of the public trust doctrine to Petitioner's lands. Petitioner fails to acknowledge the court's indication that he lost title to his lands altogether under longstanding common law principles that give the state a *jus privatum* interest in submerged coastal lands.[3] *See McQueen*, 580 S.E.2d at 119-20 (citing *Coburg Dairy, Inc. v. Lesser*, 458 S.E.2d 547 (1995)). Contrary to Petitioner's certified question, this case does not simply concern whether the public trust doctrine defeats his taking claim, *see* Pet. at 14, but also whether South Carolina can manage what have become public lands.[4]

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[3] This is in accord with the property laws of many states providing that the boundary between upland property and aquatic land owned by another entity (here the state) shifts as the line of high tide shifts. This reciprocal rule preserves expectations as borders defined by a natural feature move by accretion or as in this case, by erosion. *See, e.g. Horry County v. Woodward*, 318 S.E.2d 584, 586 (S.C. Ct. App. 1984). *Accord, Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977) (state law controls the question of moving boundaries between uplands and aquatic lands owned by the states under the equal footing doctrine).

[4] The factual complexity of this case, and the ambiguous nature of the court's decision questioning whether Petitioner even retains an

(Continued on following page)

Moreover, it is Petitioner's own neglect of his property that brought about the limitations on, if not the complete transfer to the public of, his former property interests. After purchasing his lots in the early 1960's, Petitioner, unlike his neighbors, let them languish for nearly thirty years while tidal encroachment and erosion slowly converted the property into tidelands. As the South Carolina Supreme Court noted, 580 S.E.2d at 118, 120, Petitioner failed to exercise the proper care of a property owner with an interest in maintaining his property and preparing it for future development. This lack of diligence completely undercuts Petitioner's claim that he is entitled to develop his land in a manner contrary to common law principles and renders the instant case inappropriate for review by this Court.

Petitioner has also made no showing to support his assertion, *see* Pet. at 13-14, that the public trust doctrine threatens to transform the background principles inquiry into a categorical exception to takings liability. In over sixty years of takings litigation, spanning every published state and federal decision in the country, the public trust doctrine has been raised as a background principle in less than a dozen cases. Moreover, use of the public trust doctrine varies from state to state. *See Shively v. Bowlby*, 152 U.S. 1, 26 (1894) (emphasizing the unique and individualized nature of each state's application of the public

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ownership interest in his property, do not present the clear question that was posed in *Esplanade*, 307 F.3d at 978, of whether the application of the public trust doctrine to privately owned tidelands (that had not been created by erosion or encroachment) constitutes a valid background principle of law under *Lucas*.

trust doctrine). Any fear that this narrowly confined use of the public trust doctrine by the South Carolina Supreme Court will raise a national question or change the face of takings jurisprudence is unjustified and groundless.[5]

II. THE SOUTH CAROLINA SUPREME COURT PROPERLY COMPLIED WITH THIS COURT'S ORDER TO RECONSIDER ITS DECISION IN LIGHT OF *PALAZZOLO*.

Far from being wayward, *see* Pet. at 11, the South Carolina Supreme Court fully complied with this Court's GVR order, which merely directed it to give "further consideration" in light of *Palazzolo*. "Further consideration" to a case is all that a court must do to comply with a GVR order. *See Lawrence v. Chater*, 516 U.S. 163, 168 (1996). When granting *certiorari* for a GVR order, this Court allows for a more liberal showing of cause because such an order is not a final determination on the merits of a case, but merely a "strong suggestion" that there is a relevant change to the law that the lower court should examine. *Id.* at 168 (citing *Heckler v. Lopez*, 463 U.S. 1328,

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[5] Petitioner's claims that the South Carolina Supreme Court's decision would affect up to 374,234 acres of South Carolina wetlands, *see* Pet. at 21, is clearly erroneous. This estimate represents pure speculation, is based on unreliable extrapolations from estimates of the area of privately owned *non-coastal* wetlands in the state, and does not take into account the realistic development potential (or lack thereof) of many of these lands. The conditions governing Petitioner's former lots, which are located in shallow water immediately adjacent to a shore, in an area where it is (possibly) economically feasible to fill the wetlands, cannot be said to apply to every other area of tidelands in the state of South Carolina.

1330 (1983)); *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964).

On remand, the South Carolina Supreme Court was not required to change the outcome of its decision after considering *Palazzolo*. *See Hughes Aircraft Co. v. United States*, 140 F.3d 1470, 1473 (Fed. Cir. 1998); *United States v. MCC Florida, Inc.*, 967 F.2d 1559, 1562 (11th Cir. 1992). Nor was the court required to limit its review of the case to the scope of its earlier decision. *See Lockheed Martin Corp. v. Space Sys./Loral, Inc.*, 324 F.3d 1308, 1310 (Fed. Cir. 2003) (on remand a court is not required to limit its analysis to the theory previously followed). Rather, the court was free to look to alternative facts and theories. *See Kotler v. Am. Tobacco Co.*, 981 F.2d 7, 13 (1st Cir. 1992) (when an entire judgment is vacated, the court can examine issues beyond the scope of the remand); *Moore v. Zant*, 885 F.2d 1497, 1503 (11th Cir. 1989) (a vacate order erases the judgment and leaves no appellate record, allowing the court to reconsider issues not specifically addressed in the remand order). Therefore, contrary to Petitioner's claim, *see* Pet. at 10-11, the South Carolina Supreme Court acted well within the scope of its authority on remand when it ruled that the claim was barred under background principles of South Carolina's law.[6]

On remand, the South Carolina Supreme Court gave due consideration to *Palazzolo*, given that *Palazzolo* was a partial takings case that involved ripeness and statutory

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[6] Contrary to Petitioner's argument, the state fully briefed and argued the defense that the claim was barred under background principles of South Carolina law.

notice issues. Moreover, the court certainly did not dispute *Palazzolo's* rejection of the *per se* notice rule. While the court's previous decision may have raised a notice issue,[7] the decision on remand did not rely upon this contentious issue. *See McQueen*, 580 S.E.2d at 148 & fn. 5 (discussing court's use of background principles to analyze Petitioner's takings claim). In properly identifying South Carolina's public trust doctrine – a settled, longstanding common law restriction – as a background principle that barred Petitioner's taking claim, the South Carolina Supreme Court resolved the case on a simpler and more straightforward basis.

III. THE SOUTH CAROLINA SUPREME COURT'S OPINION DOES NOT CONTRADICT *LUCAS* OR *PALAZZOLO*.

The South Carolina Supreme Court decision is consistent with this Court's decisions in *Lucas* and *Palazzolo*. In *Lucas*, 505 U.S. at 1027-29, this Court held that compensation is not required, even in a total taking case, where a background principle of state law controls use of the property.[8] Under the "objectively reasonable criteria" for

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[7] In its first decision, the South Carolina Supreme Court had stated that "[t]his pre-existing permit requirement is relevant to respondent's investment-backed expectations." *McQueen*, 530 S.E.2d at 634.

[8] In terms of the nature of the land at issue, *Lucas* is very different factually from the instant case. *Lucas* involved dry uplands, not lands submerged by tidal waters. Unlike tidelands, uplands are not covered by the traditional South Carolina public trust doctrine. Moreover, there was no question about Lucas' ownership interest in the property as there is in this case.

identifying background principles set forth in *Lucas*, the South Carolina Supreme Court properly construed the public trust doctrine, a longstanding common law doctrine, as a background principle of state law that prevents Petitioner from filling tidal wetlands in the circumstances of this case. *See Lucas*, 505 U.S. at 1030-31. Thus, Petitioner has not demonstrated a compelling reason, under Supreme Court Rule 10(c), why the Court should hear this matter.

As in many states, the public trust doctrine in South Carolina is a common law doctrine providing that lands submerged at high tide are held subject to a trust for the public. *State v. Pacific Guano Co.*, 22 S.C. 50 (1884); *Rice Hope Plantation v. South Carolina Pub. Serv. Auth.*, 59 S.E.2d 132, 144 (S.C. 1950), *overruled on other grounds, McCall v. Batson*, 329 S.E.2d 741 (S.C. 1985). Over the past century, the South Carolina courts have consistently applied this doctrine to preserve protected public interests in waterways and other tidelands. *See Cape Romain Land and Improvement Co. v. Georgia-Carolina Canning Co.*, 146 S.E. 434, 437 (S.C. 1928) (the state is responsible for protecting waters for navigation and fishery); *Port Royal Mining Co. v. Hagood*, 9 S.E. 686, 689 (S.C. 1889) (emphasizing the state's right to control land below the high water mark for the public benefit); *Sierra Club v. Kiawah Resort Assocs.*, 456 S.E.2d 397, 402 (S.C. 1995) (the public trust doctrine extends to protection of the state's waters for marine life, water quality, and public access). The public trust doctrine is even reflected in those sections of the South Carolina Constitution that compel the state to protect its waterways. *See* S.C. Const. Art. XIV §§1-4. This Court has historically recognized the importance of the

several states' sovereignty over their waterways. *Lessee of Pollard v. Hagan*, 44 U.S. 212 (1845).

The South Carolina Supreme Court properly concluded that the public trust doctrine qualified as an "objectively reasonable" background principle under *Lucas* in the circumstances of this case. *See Lucas*, 505 U.S. at 1030-31. The court noted that the state cannot permit activity that would "substantially impair[] the public interest in marine life, water quality, or public access," *McQueen*, 580 S.E.2d at 120, and that "[t]he proposed backfill would permanently destroy the critical area environment on [Petitioner's] lots." *Id.* at 118. The court also took note of Petitioner's neglect of his property, in contrast to the care taken by his neighbors. *Id.* These references to the impacts and timing of Petitioner's planned activities reflect a consideration of both "the degree of harm" posed by, and the "social value of," such activities. *See Lucas*, 505 U.S. at 1030-31 (listing criteria for identifying a background principle); *see also Palazzolo*, 533 U.S. at 630 (emphasizing "the degree of harm to public lands and resources" as one of the objective factors set forth in *Lucas*).

The South Carolina Supreme Court decision is also consistent with this Court's holding in *Palazzolo*. Under *Palazzolo*, "[a] regulation or common-law rule cannot be a background principle for some owners but not for others." *Id.* The South Carolina Supreme Court holding conforms to this stricture. In identifying the public trust doctrine as a background principle of state law, the state court adhered to a longstanding interpretation of this common law principle. As noted above, the state has always held lands below the high water mark in trust for the public. *See infra* pp. 14-15. The public trust doctrine applies equally

to Petitioner's land and to his neighbors' land. It is Petitioner's own neglect that caused the land to become submerged tidelands, thereby bringing the public trust doctrine into play.[9]

Tellingly, Petitioner does not even attempt to argue that granting this petition could be justified by a split among the lower federal and state courts on this issue. *Cf.* Supreme Court Rule 10(b). This implicit concession is fully justified because, in fact, the relatively few cases that address whether the traditional public trust in tidelands can serve as a background principle barring a taking claim in appropriate circumstances have ruled that it can. *See, e.g., National Ass'n of Home Builders of U.S. v. State of New Jersey Dept. of Envtl. Prot.*, 64 F. Supp. 2d 354 (D. N.J. 1999); *Coastal Petroleum v. Chiles*, 701 So. 2d 619 (Fla. Dist. Ct. App. 1997). Moreover, just three months ago, this Court denied a petition for *certiorari* asking it to decide whether the U.S. Court of Appeals for the Ninth Circuit erred in invoking the state of Washington's public trust doctrine to bar a regulatory taking claim. *See Esplanade Props., LLC v. City of Seattle, Washington*, 123 S. Ct. 2574 (2003).

Significantly, although the public trust doctrine clearly is a valid principle of state law under *Lucas* and *Palazzolo*, it was not the only basis for the court's decision to deny Petitioner's takings claim. While affirming the state's responsibility to hold submerged lands in trust for

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[9] This Court in *Palazzolo* did not specifically address a public trust defense; although the state raised a public trust defense, the Rhode Island Supreme Court did not reach it.

the public, the South Carolina Supreme Court also stated that the state holds presumptive title to such lands in its own right. *See McQueen*, 580 S.E.2d at 119-20; *see also Coburg Dairy,* 458 S.E.2d at 548 (the state holds title to submerged lands, including those gained through the encroachment of tidal waters); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475-76 (1988) (reaffirming case law that states own "all lands under waters subject to the ebb and flow of the tide"). This alternative ground of the South Carolina Supreme Court's decision does not even implicate *Palazzolo* or *Lucas*, for it suggests that, even if the public trust doctrine were not recognized in South Carolina, Petitioner's claim still would have failed. If, following the extensive erosion in this area, the state, and not Petitioner, owns the property, then a taking claim, on any other conceivable theory, would fail. In any event, the South Carolina Supreme Court's use of the public trust doctrine fully comports with the definitions of background principles outlined in those cases, and does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of *certiorari*.

Respectfully submitted,

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